Supreme Court, U.S.
FILED
98 924 DEC 4 1998
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1998

LESLEY GAY BLACKNER,

Petitioner,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

ROGER W. KIRBY*
DANIEL HUME
KAUFMAN MALCHMAN
KIRBY & SQUIRE, LLP
919 Third Avenue
New York, NY 10022
(212) 371-6600
Attorneys for Petitioner

*Counsel of Record

40 pp

QUESTION PRESENTED

Pursuant to a uniform agreement with its customers, Continental Airlines, Inc. ("respondent" or "Continental") imposes a financial penalty for replacement of lost tickets. Although respondent introduced the challenged provision, New Jersey's state courts held that the Airline Deregulation Act, 49 U.S.C. § 41713 ("ADA") preempts the right to challenge the provision in a court proceeding. This holding is inconsistent with *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) ("*Wolens*"), in which this Court expressly held that the ADA does not preempt common law claims arising out of privately ordered contracts. New Jersey distinguished *Wolens* on the grounds that *Wolens* involved the enforcement of a contract provision, while petitioner would void one. Thus, the question presented is,

Does the holding of the Superior Court of New Jersey, Appellate Division, that the ADA preempts petitioner's entitlement to challenge the validity under common law of a penalty provision in a contract created by respondent, conflict with *Wolens*?

PARTIES TO THE PROCEEDING

The following list identifies all parties to the proceeding in the Superior Court of New Jersey, Appellate Division.

1. Lesley Gay Blackner

2. Continental Airlines, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Practice At Issue 3

B. The Proceedings Below 4
1. The Trial Court 4
2. The Appellate Division 4
3. The New Jersey Supreme Court 5

REASONS FOR GRANTING THE PETITION 6

THE HOLDING OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THAT THE ADA PREEMPTS PETITIONER'S

CLAIM, IS IN CONFLICT WITH THIS COURT'S DECISION IN *WOLENS* AND LEFT PETITIONER WITH NO REMEDY IN ANY FORUM 6

A. Under *Wolens*, a Plaintiff May Seek Recovery Arising From a Contract Dispute with an Airline Where the Issues Do Not Implicate Enforcement of State Enacted Law or Regulation Within the Meaning of the ADA 6

B. The Ruling of the New Jersey Court Improperly Left Petitioner and Others Like Her with No Remedy In Any Forum 9

CONCLUSION 12

APPENDIX

Appendix A – Opinion of the Superior Court of New Jersey, Appellate Division, filed April 24, 1998 ..... 1a

Appendix B – Order of the Superior Court of New Jersey, Law Division, Essex County, filed June 2, 1997 .. 8a

Appendix C – Transcript of Motion dated May 30, 1997 10a

Appendix D – Order of the Supreme Court of New Jersey denying Petition for Certification, dated September 11, 1998 and filed September 11, 1998 ..... 17a

Appendix E – Relevant Statute 18a

TABLE OF AUTHORITIES

Cases

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) ..... *passim*

Continental Airlines, Inc. v. Kiefer,
920 S.W.2d 274 (Tex. 1996) 8

Gee v. Southwest Airlines,
110 F.3d 1400 (9th Cir. 1997) 8,9

Harris v. American Airlines, Inc.,
55 F.3d 1472 (9th Cir. 1995) 8

Statutes

28 U.S.C. § 1257(a) 2

49 U.S.C. § 1305 2

49 U.S.C. § 1506 2

49 U.S.C. § 40120 2,3,11

49 U.S.C. § 41713 ..... *passim*

Other Authority

Restatement 2d, *Contracts* § 356 8

PETITION FOR A WRIT OF CERTIORARI

Pursuant to its standard contract for the sale of airplane tickets, respondent charges a penalty to customers who lose their tickets prior to boarding a flight. The penalty is not related to any costs incurred by respondent in replacing lost tickets. Under the common law of contracts, uniform across the nation, contractually ordered penalties are unenforceable. Petitioner brought this lawsuit sounding in contract law to dispute the enforceability of respondent's penalty provision. The Superior Court of New Jersey, Appellate Division, held that petitioner's claim is preempted by the ADA. The holding should be reversed. It conflicts with *Wolens*, in which this Court held that the ADA does not preempt common law contract claims.

OPINIONS BELOW

The New Jersey Supreme Court issued no opinion. Its order, filed September 11, 1998, denied petitioner's request for certification to the Appellate Division. Appendix D at 17a. The opinion of the Appellate Division has been reported at 311 N.J. Super. 10, 709 A.2d 258, and is included at Appendix A at 1a. The order of the Superior Court of New Jersey, Law Division, granting respondent's motion to dismiss, and the transcript underlying the order, are included at Appendix B, 8a and Appendix C, 10a, respectively.

STATEMENT OF JURISDICTION

The Supreme Court of New Jersey entered its order denying petitioner's petition for certification on September 11, 1998. This Court has jurisdiction under 28 U.S.C. § 1257(a) because petitioner seeks review of a "[f]inal judgment...or decree...rendered by the highest court of a State in which a decision could be had" (here, the Appellate Division) and respondent claimed (and obtained) immunity from suit under a statute of the United States.

STATUTORY PROVISIONS INVOLVED

49 U.S.C. § 41713(b)(1) provides:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service or an air carrier that may provide air transportation under this subpart.[1]

49 U.S.C. § 40120(c) provides: "A remedy under this

---

[1] At the time the dispute in *Wolens* arose, the operative provision of the ADA was codified at 49 U.S.C. § 1305. In 1994, Congress recodified this provision at 49 U.S.C. § 41713. As both the majority and dissent noted in *Wolens*, Congress intended this revision to make no substantive change. *See Wolens*, 513 U.S. at 224, n.2, 238, n. 1.

part is in addition to any other remedies provided by law."[2]

STATEMENT OF THE CASE

A. The Practice At Issue.

Pursuant to a form contract that it drafted and incorporates into every airplane ticket purchase, respondent imposes penalties on passengers seeking to replace lost tickets. As in this case, the penalty can represent over 50% of the ticket price, and over 100 times the actual costs of replacing the ticket. The particular facts alleged here, and deemed true at the motion to dismiss stage, are as follows.

On March 18, 1996, petitioner paid $210 to Continental for a round-trip ticket between Jacksonville, Florida, and Newark, New Jersey. *See* Appendix of Plaintiff-Appellant to the Superior Court of New Jersey, Appellate Division, at Pa2. Prior to boarding her return flight from Newark, petitioner discovered that she had lost her ticket and so informed a Continental agent at the airport. *Id.* The agent told petitioner that she could not board the plane unless she purchased a new ticket. She then could apply for a refund respecting her original ticket, less a $60 penalty. *Id.* at Pa3. Confronted with the prospect of either paying the penalty or missing the flight,

---

[2] This section formerly was codified at 49 U.S.C. § 1506. Although Congress altered the wording of this section in its 1994 revision, the Revision Notes explain that the change merely was "to eliminate unnecessary words and for clarity and consistency in the revised title and with other titles of the United States Code," 49 U.S.C. § 40120, Historical and Statutory Notes, *citing* House Report No. 103-180. The pre-1994 version was the operative one in the *Wolens* case.

petitioner had no realistic choice. She was forced to purchase another ticket and pay the penalty. *Id.* The penalty represented 57% of the cost of the return portion of the ticket. *Id.* Continental has not disputed that the charge bears no reasonable relationship to the costs incurred.

An electronic, computer-generated, ticket would have sufficed to permit petitioner to board her plane. The cost of issuing a replacement ticket electronically is about 50¢, less than 1/100th the penalty. Even were an actual paper ticket necessary, that would have cost no more than $8-10. *Id.* at Pa4. Thus, the $60 replacement charge is unrelated to any actual loss sustained by Continental for the issuance of a new ticket. It is, in a word, a penalty, and a spokesperson for another airline has characterized a comparable charge as being such. *Id.* Continental imposes the same penalty on any passenger unable to produce his/her paper ticket at the boarding gate.

B. The Proceedings Below.

1. The Trial Court. Petitioner commenced this case on November 14, 1996. She sought to avoid Continental's illegal imposition of an unenforceable penalty. Continental answered the complaint on January 16, 1997, and then moved to dismiss on April 2, 1997, which the trial court granted on June 2, 1997. Appendix B at 8a. The order dismissing the action contained no analysis. However, in the transcript of the hearing that had taken place on May 30, 1997, the court expressed what appears to be its underlying reasoning: "[If] there's a breach of... contract, the action lies in the states. To the extent that there is some problem with that contract...you have to take it up with the federal authorities. I don't think the law...permits me to intrude on that area in determining what is

and what is not a proper contractual term enforceable in this state." Appendix C at 10a.

2. The Appellate Division. Petitioner appealed the dismissal to the Superior Court of New Jersey, Appellate Division. Argument was heard on March 9, 1998, and a decision affirming the opinion below was issued on April 24, 1998. Appendix A at 1a. Remarkably, the decision acknowledged that this Court in *Wolens* had "held that suits based on the alleged contract between the airline and its customers were not preempted," but attempted to limit the holding of *Wolens* on the grounds that in this matter "what plaintiff seeks is not to enforce the contract but to overturn it through a declaration invalidating the $60 surcharge provision. And she seeks that relief because she claims that the surcharge provision constitutes a penalty and is thus barred by the law of this state." *Id.* at 5a.

3. The New Jersey Supreme Court. Petitioner sought certification of the judgment, and on September 11, 1998, the New Jersey Supreme Court, without opinion, and on a single page executed by the clerk of that court, wrote: "It is ORDERED that the petition for certification is denied, with costs." Appendix D at 17a.

REASONS FOR GRANTING THE PETITION

THE HOLDING OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THAT THE ADA PREEMPTS PETITIONER'S CLAIM, IS IN CONFLICT WITH THIS COURT'S DECISION IN *WOLENS* AND LEFT PETITIONER WITH NO REMEDY IN ANY FORUM.

A. Under *Wolens*, a Plaintiff May Seek Recovery Arising From a Contract Dispute with an Airline Where the Issues Do Not Implicate Enforcement of a State Enacted Law or Regulation Within the Meaning of the ADA.

The Appellate Division's improper application of federal preemption deprived petitioner and all others similarly situated of a remedy for Continental's unconscionable imposition of a penalty under the private contract between the parties. The New Jersey court did so under the misapprehension that the ADA preempts petitioner's common law claim and requires the dismissal of her action. This is directly contrary to this Court's ruling in *Wolens*, that claims pertaining to a privately-ordered contract are not preempted.

To prevent states from enacting their own regulations to replace those that Congress eliminated with the passage of the ADA, Congress provided that "States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." *See Wolens*, 513 U.S. at 222-23, *citing* 49 U.S.C. 41713(b)(1).

In *Wolens*, the Court construed this provision not to preempt a common law contract claim in a case involving American Airlines' frequent flier program (AAdvantage). American had made retroactive changes to the terms of the program regarding blackout dates and limits on seats available to passengers who obtained tickets with frequent flier miles. Certain AAdvantage members brought a class action in Illinois state court that eventually reached the Illinois Supreme Court, which held that appellants could maintain actions based on both breach of contract and Illinois' unfair and deceptive trade practices ("UDAP") statute. American appealed the decision to this Court, contending that both claims were preempted by the ADA.

This Court held that common law contract claims were not preempted by the ADA. *See* 513 U.S. at 231. The Court specifically distinguished claims based on a state's statute, such as Illinois' UDAP, from common law claims asserted by a party to a private contract. *Id.* at 232-33. While state substantive policy choices set forth in a UDAP statute may be preempted, common law doctrines of contract enforcement are not. *Id.* The Court found that Congress was concerned primarily with state public policy affecting "rates, routes, or services," not adjudication of common law claims. *Id.*

The Superior Court of New Jersey, Appellate Division, limited *Wolens* to claims for the enforcement of contract provisions and held that other common law contract claims are preempted by the ADA. The Appellate Division failed to note that in *Wolens*, this Court considered and explicitly rejected such an interpretation of ADA preemption. Addressing the contention that "'some state-law principles of contract law...might well be preempted to the extent they seek to

effectuate the State's public policies, rather than the intent of the parties,'" the majority dismissed it, stating: "[C]ontract law is not at its core 'diverse, nonuniform, and confusing'" so as to pose a "large risk of nonuniform adjudication" of contract claims. *Wolens*, 513 U.S. 233 n.8 (citation omitted); *See also Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 282 (Tex. 1996) ("*Kiefer*").

State law does not vary at all as to petitioner's common law contract claim. According to the common law of every state (including New Jersey), so-called liquidated damages clauses that amount to penalties, like the $60 Continental charges for a lost ticket, are unenforceable. *See* Restatement 2d, *Contracts* § 356, and collected cases. The common law prohibition against penalties simply does not rise to the level of individual states' legislative public policy. *See Kiefer*, 920 S.W.2d at 282 (interpreting *Wolens* to mean that "contract enforcement involves so little state policy that it cannot be considered regulation of airlines preempted by the ADA," the Texas Supreme Court held a negligence claim also was not preempted because negligence law is "far more policy-neutral than specific-purpose legislation, like consumer protection laws," even though the duty of care is imposed by state law and even though negligence law is not as uniform as contract law).[3]

---

[3] Since *Wolens* was decided, courts have attempted to apply the holding of that case to a variety of fact patterns, but with little uniformity of result. Thus, as noted in the text, the Texas Supreme Court held that a common law negligence claim was not preempted by the ADA. *See Kiefer*, 920 S.W.2d at 283. In *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995), by contrast, the Ninth Circuit found that plaintiff's tort claims were preempted, while in *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997), the Ninth Circuit held that tort claims seeking damages for emotional

Petitioner's contract claim is no more laden with state policy than any common law claim. To tolerate Continental's contention would precipitate a glissade by which the ADA would, in the words of Justice O'Connor, "swallow all of contract law." *Wolens*, 513 U.S. at 248 (O'Connor, J., dissenting). This Court should grant *certiorari* to correct the Appellate Division's misapplication of ADA preemption.

B. The Ruling of the New Jersey Court Improperly Left Petitioner and Others Like Her with No Remedy In Any Forum.

The Appellate Division's misapplication of federal preemption deprived petitioner of any remedy because the ADA does not confer jurisdiction on the federal courts to resolve such a dispute. *See Wolens*, 513 U.S. at 232:

> [I]t [is not] plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services. The ADA contains no hint of such a role for the federal courts. In this regard, the ADA contrasts markedly with the ERISA, which does channel

---

distress were preempted, while those seeking recovery for bodily injury were not. The *Gee* court added a further wrinkle by holding that although the tort claims for bodily injury could go forward, California state law providing the standard of care for such claims was preempted, so that the claims could proceed only under a "common law standard of care," 110 F.3d at 1408. In each of these cases, the court attempted to apply the reasoning of *Wolens* to determine the contours of ADA preemption.

civil actions into federal courts.

Nor is the Department of Transportation ("DOT"), charged with, among other things, regulating the commercial airline business, equipped to adjudicate such claims. *See Id.*:

> [T]he DOT has neither the authority nor the apparatus required to superintend a contract dispute resolution regime...When Congress dismantled that regime...the lawmakers indicated no intention to establish, simultaneously, a new administrative process for DOT adjudication of private contract disputes...

Wolens, 513 U.S. at 232 (emphasis added). The Court elaborated:

> "[W]ho decides (here, courts or the DOT, the latter lacking contract dispute resolution resources for the task)? On this question, all agree to this extent: None of the opinions in this case would foist on the DOT work Congress has neither instructed nor funded the Department to do."

Id. at 234.

This Court's recognition that there is no other forum besides a state court for adjudicating a contract dispute with an airline was an important factor in its conclusion that the ADA does not preempt state law contract claims. *See* 513 U.S. at 230-232. The Court explained: "The conclusion that the ADA permits state-law-based court adjudication of routine breach of contract claims...makes sense of Congress' retention of the

FAA's savings clause." 513 U.S. at 232. The savings clause expressly states that remedies under the ADA are "in addition to any other remedies provided by law." 49 U.S.C. § 40120. Congress' preservation of such remedies illustrates the understanding that private contracts would be meaningless without a way to enforce them, obtain reasonable redress for their breach, and challenge the introduction of improperly onerous provisions.

In short, if petitioner cannot present her claims in state court, then she has no forum in which to present them, and airlines would be licensed to impose any contract-grounded penalties with impunity. This Court should not countenance such a result without specific indication from Congress that it intended the ADA to preclude the ordinary operation of contract law.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Roger W. Kirby*
Daniel Hume
KAUFMAN MALCHMAN
KIRBY & SQUIRE, LLP
919 Third Avenue
New York, NY 10022
(212) 371-6600
Counsel for Petitioner

*Counsel of record

APPENDIX

APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED APRIL 24, 1998

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5967-96T2

LESLEY GAY BLACKNER, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

vs.

CONTINENTAL AIRLINES, INC.,

Defendant-Respondent.

Argued March 9, 1998 – Decided APR 24 1998

Before Judges Newman, Collester and Lesemann.

On appeal from Superior Court of New Jersey, Law Division, Essex County.

Roger W. Kirby, admitted pro hac vice, argued the cause for appellant (Goldstein, Lite & DePalma, attorneys; Mr. Kirby of counsel, Allyn Z. Lite and Robert J. Berg, on the brief).

Peter B. Van Deventer, Jr. argued the cause for respondent (St. John & Wayne, attorneys; Mr. Van Deventer and Douglas H. Amster of counsel and on the brief).

Appendix A

The opinion of the court was delivered by LESEMANN, J.S.C. (temporarily assigned).

Plaintiff Lesley Gay Blackner appeals from a Law Division order granting defendant's motion to dismiss her complaint with prejudice. The order was based on the court's determination that plaintiff's claim was preempted by §1305(a)(1) of the Airline Deregulation Act of 1978 (ADA), 49 *U.S.C.A.* 1305(a)(1), which provides that no state may enforce any law "relating to rates, routes, or services" of an air carrier. The facts of the case can be simply stated and are essentially undisputed.

Plaintiff purchased a round-trip ticket from Continental Airlines (Continental) to travel from Jacksonville, Florida to Newark and then return to Jacksonville. The total cost of the ticket was $210. Thereafter she lost her return ticket. When she inquired of Continental, she was told that Continental would replace the lost ticket but would impose a $60 surcharge because of the loss. Believing she had no practical choice in the matter, plaintiff followed Continental's mandated procedure, but then instituted this suit.

In her complaint plaintiff alleges that the $60 surcharge bears no reasonable relationship to any cost actually incurred by Continental to replace her lost ticket. She thus describes the surcharge as a "penalty," unlawful "under the contract law of New Jersey and the other states." She also includes in her complaint additional counts for unjust enrichment and breach of a covenant of good faith and fair dealing which she says exists by implication in her contract with Continental.[1] She

1. The "contract" governing the relationship between Continental and its passengers is a lengthy document referred to as a "contract of (Cont'd)

seeks damages and counsel fees and asks that the suit be certified as a class action on behalf of all other persons who have been assessed an improper penalty by Continental because of a lost ticket.

Defendant's motion to dismiss was grounded in the preemption argument noted above. The court agreed with that position and, accordingly, dismissed the complaint. Plaintiff's appeal followed. Since we are satisfied that the trial court's decision is required under controlling decisions of the United States Supreme Court, we affirm.

The ADA, adopted in 1978, represented a significant change in Congress' regulation of the airline industry. By its enactment, Congress abandoned the approach embodied in the Federal Aviation Act of 1958 (FAA), which had empowered the Civil Aeronautics Board to regulate the interstate airline industry. By adopting the ADA, Congress determined that " 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality. . . of air transportation services. . . .' " *Morales v. Trans World Airlines, Inc.*, 504 *U.S.* 374, 378, 112 *S. Ct.* 2031, 2034, 119 *L. Ed.* 2d 157, 164 (1992). The inclusion of §1305(a)(1) within the ADA was a necessary part of that new approach:

(Cont'd)
carriage." Pursuant to 49 *U.S.C.* §41707, "an air carrier may incorporate by reference in a ticket or written instrument any term" of that contract and plaintiff's ticket here does refer to and incorporate those terms. The full contract, which is said to be available for inspection at any airport serving Continental or at any Continental office, expressly authorizes Continental to "impose a service charge of. . . $60 per ticket for handling. . . [a] request for refund of a lost ticket. . . ."

> To ensure that the States would not undo Federal deregulation with regulation of their own, the ADA included a preemption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier.
>
> [*Ibid.*]

In *Morales*, *supra*, the Supreme Court gave broad meaning to the term "relating to" rates, routes or services. It said that language not only prohibited States from "prescribing rates, routes or services" but also from taking any enforcement actions having a connection with or reference to airline 'rates, routes, or services' . . ." whether through laws "specifically addressed to the airline industry" or through more general statutes. 504 *U.S.* at 384, 112 *S. Ct.* at 2037, 119 *L. Ed.* 2d at 167-68.

The Supreme Court next dealt with §1305(a)(1) in *American Airlines, Inc. v. Wolens*, 513 *U.S.* 219, 115 *S. Ct.* 817, 130 *L. Ed.* 2d 715 (1995), which involved an airline's attempt to effect retroactive changes in its frequent flyer program. The Court held that the Illinois Consumer Fraud Act could not be imposed on an airline because to do so would represent "intrusive regulation of airline business practices" by the state, which would violate §1305(a)(1). However, it also held that suits based on the alleged contract between the airline and its customers were not preempted:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own self-imposed undertakings. . . . [T]erms and

> conditions airlines offer and passengers accept are privately ordered obligations 'and thus do not amount to a State's enact[ment] or enforce[ment] [of] any law, rule, regulation, standard or other provision having the force and effect of law within the meaning of Section 1305(a)(1).'
>
> (*American Airlines, Inc. v. Wolens, supra*, 513 *U.S.* at 228-29, 115 *S. Ct.* at 824, 130 *L. Ed.* 2d at 725-26.]

Plaintiff claims that the principle of *Wolens*, which permits state court enforcement of contracts voluntarily entered into between an airline and its customers, authorizes this suit. But plainly, that is not so.

Plaintiff does not seek enforcement of any contract she had with Continental. Quite the contrary, the contract that exists between plaintiff and the airline clearly authorizes the surcharge of which plaintiff complains. What plaintiff seeks is not to enforce the contract but to overturn it through a declaration invalidating the $60 surcharge provision. And she seeks that relief because she claims that the surcharge provision constitutes a penalty and is thus barred by the law of this state.

That reasoning is precisely what was rejected in *Wolens*, as well as *Morales*. In *Wolens*, Justice Ginsburg set out the principle clearly and succinctly: "This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 513 *U.S.* at 232-33, 115 *S. Ct.* at 826, 130 *L. Ed.* 2d at 728.

Plaintiff's suit clearly falls on the prohibited side of the line drawn in *Wolens*. The essence of her claim is an "enlargement or enhancement [of her rights] based on state laws or policies external to the agreement," which, she says, should invalidate a portion of the contract between her and the airline. The complaint violates the essence of the preemption provision of §1305(a)(1) and thus it cannot stand.

The conclusion we reach here is consistent with that reached in *Vail v. Pan Am Corp.*, 260 *N.J. Super.* 292 (App. Div. 1992), and also with that reached by the Seventh Circuit Court of Appeals in *Statland v. American Airlines, Inc.*, 998 *F.* 2d 539 (7th Cir.) *cert. denied*, 510 *U.S.* 1012, 114 *S. Ct.* 603, 126 *L. Ed.* 2d at 568 (1993). In *Vail*, we held, consistent with *Morales*, that the language of §1305(a)(1) must be given a broad reading and that it prohibited a state court suit seeking damages for alleged fraudulent representations by an airline that it had adopted a particular security program. We found that, "[p]laintiffs' claims quite obviously 'relat[e] to' airline fares and services" and, therefore, the suit before us was preempted by §1305(a)(1). *Vail*, *supra*, 260 *N.J. Super.* at 299.

In *Statland*, the airline had collected a penalty when plaintiff canceled a ticket she had previously bought. Plaintiff claimed the airline improperly calculated the permissible amount of the penalty and sued in state court to recover the amount in dispute. Much of the court's decision discussed plaintiff's claim that she had a right of recovery under federal law but, after the court rejected that argument, it turned to her attempt to maintain a suit under state law. That portion of plaintiff's suit was then dismissed on preemption grounds under §1305(a)(1) and the holding of *Morales v. Transworld Airlines, Inc.*, *supra*. The court said, "[w]e think it obvious that canceled

ticket refunds relate to rates." *Statland, supra*, 998 *F.* 2d at 542. We think the same here, and that the dismissal of plaintiff's complaint is, in all respects, consistent with our prior decision in *Vail* as well as with the federal precedent set forth in *Morales* and *Wolens*.

Affirmed.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY FILED JUNE 2, 1997

ST. JOHN & WAYNE, L.L.C.
Two Penn Plaza East
Newark, New Jersey 07105
(201) 491-3600
Attorneys for Defendant, Continental Airlines, Inc.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. ESX-L-12831-96

Civil Action

LESLEY GAY BLACKNER, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

CONTINENTAL AIRLINES, INC.,

Defendants.

ORDER

THIS MATTER having been brought before the Court upon the motion of defendant, Continental Airlines, Inc., pursuant to *R.* 4:6-2(e) for failure to state a claim upon which relief can be granted, and the Court having reviewed the papers and arguments submitted in support of and in opposition to said motion and for good cause shown;

Appendix B

IT IS on this 2nd day of June, 1997;

ORDERED, that defendant's motion to dismiss be and hereby is granted; and it is further; –

ORDERED, that plaintiff's Complaint be and hereby is dismissed with prejudice and without costs; and it is further;

ORDERED, that a true copy of this Order shall be served upon all counsel within ten (10) days of it receipt hereof.

s/ Jack B. Kirsten
JACK B. KIRSTEN, J.S.C.

APPENDIX C — TRANSCRIPT OF MOTION DATED MAY 30, 1997

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART
ESSEX COUNTY, DOCKET NO: ESX-L-12831-96

LESLEY GAY BLACKNER,

Plaintiff

vs.

CONTINENTAL AIRLINES, INC.,

Defendant.

TRANSCRIPT OF MOTION

Place: Essex County Courthouse
50 Market Street
Newark, New Jersey

Date: May 30, 1997
Pages: 1 - 7

BEFORE:

THE HONORABLE JACK B. KIRSTEN, J.S.C.

TRANSCRIPT ORDERED BY:

ROBERT BERG, ESQ.

Appendix C

APPEARANCES:

ROBERT BERG, ESQ., (Goldstein, Lite & DePalma), Attorney for the Plaintiff

DANIEL HUME, ESQ., (Kaufman, Malchman, Kirby & Squire LLP), Attorney for the Plaintiff

PETER B. VAN DEVENTER, ESQ., (Robinson, St. John & Wayne), Attorney for the Defendant

CARMEN LILOIA, CSR, CM
Official Court Reporter
Essex County Courts Building
50 Market Street
Newark, New Jersey 07102

[2] THE CLERK: Blackner versus Continental Airlines, 12831-96.

MR. BERG: Robert Berg from Goldstein Lite and DePalma for the plaintiff.

MR. HUME: Daniel Hume from Kaufman, Malchman, Kirby & Squire, for the plaintiff.

MR. VAN DEVENTER: Peter B. Van Deventer from the firm of Robinson St. John & Wayne, for Continental Airlines.

THE COURT: This is the case of the lost ticket?

MR. VAN DEVENTER: That's correct.

THE COURT: If I had some talent here for writing, who's that fellow that writes all the books about law? Grisham? This is a plot of the good plot, the case of the lost airline ticket.

Go ahead.

MR. VAN DEVENTER: This is Continue Airlines Inc.'s motion to dismiss plaintiff's complaint, which has been couched as a class action, yet not certified. Based upon rather straight forward facts, and I would submit to your Honor from the outset that everything in this particular case and everything in this motion, and the case law itself, is black and white. And we don't have a gray area in this particular matter.

THE COURT: Very well, I read your papers, counsel.

MR. VAN DEVENTER: I'm going to make it brief, Judge, in that case.

[3] THE COURT: Huh?

MR. VAN DEVENTER: I'll make it brief in terms of my argument here. I thought —

THE COURT: All right. I guess you get paid by the word. I already read your papers —

MR. VAN DEVENTER: Should I rest, your Honor?

THE COURT: If you'd like to proceed, do so.

MR. VAN DEVENTER: No, just very briefly, Judge, since your Honor is familiar with the papers.

Appendix C

The ADA, Airline Deregulation Act, is clear as to what is preempted and what is not preempted. The Supreme Court of the United States has made it clear how that is to be interpreted. In the three cases that your Honor is very familiar with, I suggest the *Statland* case is almost a case as fact pattern as we can get.

In reviewing the papers filed in opposition, the only argument I see counsel making to maintain this action in state court is a possible breach of contract issue that might not be preempted, based upon the *Wolens* matter, and that happens to be on its face correct.

However, as I'm sure your Honor has noted in reviewing the *Wolens* case, that breach of contract action, as a state cause of action, can only remain if it is alleged that a term of the contract of carriage was breached itself.

And in this case, there can be no dispute, the [4] contract of carriage provides for the sixty dollar charge. It was charged. So, your Honor, I respectfully submit that this matter should be dismissed in light of all the case law and the ADA act.

Thank you.

MR. BERG: Good morning, your Honor.

THE COURT: All right, Sir.

MR. BERG: When we drafted this complaint, we were well aware of the case law, and in particular of the *Wolens* decision. The Supreme Court in *Wolens* said the Airline Deregulation Act does not preempt all causes of action and, in fact, it specifically said the Airline Deregulation Act permits breaches of contract actions to go forward.

With that in mind, we drafted a breach of contract cause of action here. *Wolens* allows that type of an action to proceed. It does not preempt it by the Airline Deregulation Act.

THE COURT: This is not a breach of contract, though?

MR. BERG: It is. In every contract — in no contract is a penalty permitted under the law of any of the states, including New Jersey.

THE COURT: No contract? I don't understand.

MR. BERG: You can't have a penalty.

THE COURT: I don't understand that.

MR. BERG: What happens here, Continental charges you [5] a sixty dollar penalty if you lose your ticket to reissue a ticket. The cost to Continental for reissuing a ticket, if a ticket is needed, is fifty cents. If it's done electronically, now the airlines have gone to electronic tickets, and it's eight dollars —

THE COURT: What you're saying is the provision in the contract, which creates a penalty, is against public policy and unenforceable?

MR. BERG: It's not enforceable under the Common Law of all the states in the United States. It is part of the contract law, the body of contract law prohibits the imposition of penalties in contracts.

THE COURT: I see your point. Anything else?

MR. BERG: If your Honor has any questions.

THE COURT: Sir, although I have great deal of, let's put it this way, concern about the deregulation of the airline industry, and its effect on the travelling public, as a general concern, nevertheless, I think we're bound by federal law which in effect is designed to protect the airlines from individual suits in the various states. Since the airlines travel through several states, the law seems to me clear that they approve these contracts and to the extent that they are — there's a breach of that contract, the action lies in the states. To the extent that there is some problem with that contract, it seems to me that you have to take it up with the federal authorities. [6] The fact that there maybe some clause in that contract that you feel is illegal, under Common Law, or under public policy, or because of a difference in the bargaining powers of the parties, I sympathize with you. But I don't think that the law, as I see it, and as cited by the movant here, permits me to intrude on that area in determining what is and what is not a proper contractual term enforceable in this state.

MR. BERG: Your Honor, the Texas Supreme Court in the *Kiefert* decision, which we cited, specifically addressed this issue and said that the contract law is so uniformed across the country and impinges so little upon state imposition of policy that it does not impinge upon the Airline Deregulation Act and as a result, contract law —

THE COURT: Counsel, in my experience in this case, and in citing this case, experience generally, the area that I practiced in before I went on the bench, was regulation of monopoly industry such as the airline industry. I'm perfectly aware of the laws that govern these industries. It doesn't mean I agree with

it, but I have an obligation to enforce it, and although I'm very sympathetic, believe me, with the point of view of your plaintiff in this case, I think all of us have found ourselves in the same circumstances or similar circumstances in dealing with the airlines in the past. It's a very common problem. But it's my opinion a federal problem, not a state problem. I'll grant the application for dismissal.

[7] MR. VAN DEVENTER: Thank you, your Honor.

(Matter concluded)

CERTIFICATION

I, Carmen Liloia, C.S.R., C.M., License Number 849, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of my stenographic notes taken in the above matter to the best of my knowledge and ability.

s/ Carmen Liloia 6/18/97
Carmen Liloia, C.S.R., C.M. Date

Essex County Courts Building

APPENDIX D — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION DATED SEPTEMBER 10, 1998 AND FILED SEPTEMBER 11, 1998

SUPREME COURT OF NEW JERSEY
C-1 September Term 1998
46,118

LESLEY GAY BLACKNER,

Plaintiff-Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5967-96 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 10th day of September, 1998.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX E — RELEVANT STATUTE

49 U.S.C. § 41713

UNITED STATES CODE
TITLE 49. TRANSPORTATION
SUBTITLE VII—AVIATION PROGRAMS
PART A—AIR COMMERCE AND SAFETY
SUBPART II—ECONOMIC REGULATION
CHAPTER 417—OPERATIONS OF CARRIERS
SUBCHAPTER I—REQUIREMENTS

Current through P.L. 105-216, approved 7-29-98

§ 41713. Preemption of authority over prices, routes, and service

(a) Definition.—In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the

transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

Appendix E

(B) Matters not covered.—

(A) (i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).—This paragraph shall not limit the applicability of paragraph (1).

(3)

98-924

No.

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

IN THE

Supreme Court of the United States

October Term, 1998

LESLEY GAY BLACKNER,

Petitioner,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEFFREY J. ELLIS
BRIAN P. SEXTON
DONNA H. BAKALOR
RICHARD M. FREIMAN*
QUIRK AND BAKALOR, P.C.
845 Third Avenue
New York, New York 10022
(212) 319-1000

Attorneys for Respondent

* *Counsel of Record*

REPRINTED COPY

33 pp

QUESTION PRESENTED

Can a passenger use state law to alter a contract of carriage for air transportation and recover damages when the airline acts in accordance with same?

Answer of the Court below:

The New Jersey State Courts answered this question in the negative.

CORPORATE AFFILIATES

The following list identifies all parent companies and nonwholly owned subsidiaries of Continental Airlines, Inc.

1. Continental Aircraft Corp.
2. Continental Airlines Corp.

TABLE OF CONTENTS

QUESTION PRESENTED.....*i*

CORPORATE AFFILIATES.....*ii*

TABLE OF CONTENTS.....*iii*

TABLE OF AUTHORITIES.....*iv*

REASONS FOR DENYING THE PETITION.....1

THE ADA PREEMPTION RULE SET FORTH IN WOLENS CONFINES COURTS, IN BREACH OF CONTRACT ACTIONS, TO THE PARTIES' BARGAIN, WITH NO ENLARGEMENT OR ENHANCEMENT BASED ON STATE LAWS OR POLICIES EXTERNAL TO THE AGREEMENT.

CONCLUSION.....15

APPENDIX

APPENDIX A - Petitioner's Complaint, filed November 14, 1996.....1a

TABLE OF AUTHORITIES

Cases

American Airlines, Inc. v. Wolens,
513 U.S.219 (1995).....*passim*

Continental Airlines, Inc. v. Kiefer,
920 S.W.2d 274 (Tex. 1996).....5,6,7,8,9,10

Morales v. Trans World Airlines, Inc.
504 U.S. 374 (1992).....1,4,5,6,7,8,10,15

Pilot Life Insurance Co. v. Dedeaux,
481 U.S.41 (1987).....10

Statutes

Airline Deregulation Act of 1978.....3,5
49 U.S.C. §1305(a), recodified without substantive
change at 49 U.S.C. §41713(b)(1)

Federal Aviation Act of 1958.....8
49 U.S.C. §40101, et seq. and
49 U.S.C. §40120(c)

REASONS FOR DENYING THE PETITION

THE ADA PREEMPTION RULE SET FORTH IN WOLENS CONFINES COURTS, IN BREACH OF CONTRACT ACTIONS, TO THE PARTIES' BARGAIN, WITH NO ENLARGEMENT OR ENHANCEMENT BASED ON STATE LAWS OR POLICIES EXTERNAL TO THE AGREEMENT.

The Petitioner's request for certiorari is comprised of approximately five pages of substantive argument. The apparent reason for such brevity is that Petitioner cites to only four cases. One of those four cases, American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995), is a decision of this Court which addresses the scope of preemption of contractual claims such as the one at bar. However, the other three cases cited by Petitioner deal only with personal injury claims. Indeed, two of these cases are cited only in a footnote in the Petition. (Pet. 8, Fn.3)

The Petitioner has ignored the underlying basis for the holding of the New Jersey Appellate Court as well as the cases cited therein. Petitioner even ignores a prior decision of this Court which is directly on point, Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992). Moreover,

Petitioner selectively quotes from the Wolens case and by so doing omits portions of that holding which the New Jersey Court recognized as controlling. Even a cursory review of these relevant holdings readily demonstrates that there is no substantive basis to disturb the underlying decision of the New Jersey Court nor to grant the Petition now before this Court.

In considering this Petition, it is important to note that Petitioner does not dispute that Respondent's fee for reissuing a lost ticket is part of its conditions of carriage and incorporated into all of the tickets which it issues. (Pet. 3, Res. App. 2a). Nonetheless, Petitioner's complaint alleges in paragraph 16 that such a fee is "prohibited" by "the contract law of New Jersey". (Res. App. 8a)

Petitioner contends that "New Jersey contract law" can be used to not only void the lost ticket fee imposed by the contract of carriage but to also require the Respondent to pay unspecified damages for including this fee as part of its passenger contract. Such a conclusion is certainly not the opinion of the three New Jersey courts to consider this claim. In this regard, it is relevant to note that Petitioner's

argument was rejected first by the Law Division of the New Jersey Superior Court, then by the Appellate Division of the New Jersey Superior Court and then by the Supreme Court of the State of New Jersey when it refused to disturb the rulings of the two lower courts. (Pet. 1). Despite the fact that three New Jersey Courts recognized that Petitioner's attempt to use New Jersey law to alter an airline passenger's contract is preempted, Petitioner, nonetheless, seeks a review by this Court which would in effect tell the New Jersey courts that they have misinterpreted their own law and wrongfully limited a broader application of same. Petitioner's argument has no substantive merit.

As the underlying New Jersey Courts recognized, Petitioner's attempt to use State law to alter the Respondent's contract of carriage and to penalize the Respondent for acting in accordance with same is clearly preempted by the express preemption provision of the Airline Deregulation Act of 1978 (hereinafter the "ADA") originally codified at 49 U.S.C. App.§ 1305(a) now recodified without substantive change at 49 U.S.C. § 41713(b)(1). The New Jersey Courts correctly noted that the ADA "represented a significant change in Congress' regulation of the airline industry".

(Pet. App. A at 3a). The New Jersey Appellate Division cited to this Court's decision in Morales, supra, to explain the rationale behind that 1978 legislation:

> By adopting the ADA, Congress determined that "maximum reliance on competitive market forces" would best further 'efficiency, innovation, and low prices' as well as variety [and] quality . . . of air transportation services . . ." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378, 112 S. Ct. 2031, 2034, 119 L. Ed.2d 157, 164 (1992). The inclusion of § 1305(a)(1) within the ADA was a necessary part of that new approach:
>
> To ensure that the States would not undo Federal deregulation with regulation of their own, the ADA included a preemption provision, prohibiting the States from enforcing any law 'relating to rates, routes or services' of any air carrier.

(Pet. App. A at 3a-4a).

Petitioner's failure to cite to Morales is inexplicable since this Court's decision in Wolens is replete with references to that case. Moreover, the only other case cited by Petitioner in the body of her argument, i.e., not cited in a footnote, Continental Airlines, Inc. v. Kiefer, 920 S.W.2d 274 (Tex. 1996), specifically cites to Morales to set forth the scope of preemption intended by the ADA.

Although Petitioner does not set forth any specific holding in the Kiefer decision, it is relevant to note that Kiefer held that a suit based on a passenger being injured by a falling overhead bag did not fall within the preemptive scope of the ADA. 920 S.W.2d at 275-276. While the relevance of such a holding to the case at bar is somewhat unclear, it should be noted that the Kiefer decision clearly recognized that Morales prohibited the type of suit at issue herein.

The Kiefer decision correctly notes that the focus of Morales was on the scope of preemption intended by the ADA's express preemption provision. 49 U.S.C. App. 1305(a) now codified as 49 U.S.C. 41713(b)(1). That section prohibits the use of State law "relating to rates,

routes or service of any air carrier". 920 S.W.2d at 277. Kiefer specifically cites to Morales for its analysis as to the intended scope of the ADA's preemption provision. Id. at 278.

Kiefer cites to that portion of the Morales decision wherein this Court construes the meaning of the term "relating to":

> The phrase "relating to", the [Supreme] Court said, means to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," and thus "expressed a broad pre-emptive purpose." Id. at 383. The [Supreme] Court compared the provision to "the similarly worded pre-emption provision of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a)". Id. at 383. Noting that it had, in several cases, already characterized identical language in the ERISA provision as having a "broad scope" and "expansive

> sweep", and as being "broadly worded", "deliberately expansive", and "conspicuous for its breadth", the [Supreme] Court concluded: "We think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted" by the ADA. 504 U.S. at 384.

920 S.W.2d at 278-279.

Like the Kiefer decision, the underlying decision of the New Jersey Appellate Division cites to the exact same holding of this Court in Morales. (Pet. App. A at 4a). Although Petitioner omits any citation to Morales, reference to same is obviously a necessary prerequisite to determining any case which turns upon the intended scope of ADA preemption. By failing to consider Morales, Petitioner's argument distorts this Court's holding in Wolens.

Petitioner claims that Wolens would permit her case to go forward simply because it is characterized as a

common law cause of action. However, no holding in either Wolens or Morales supports such an argument. Indeed, both of those cases clearly preempt this type of claim because it has a significant regulatory impact on airline rates and attempts to use State law alter an airline's contract of carriage.

Although Petitioner claims the "ADA's savings clause" supports her argument (Pet. 10-11), she ignores that portion of the Kiefer decision which specifically cites to Morales as rejecting the argument that the savings clause in the prior statute limited the breadth of the ADA preemption provision. 920 S.W.2d at 279. In this regard, it is also relevant to note the general savings clause referred to was not part of the 1978 ADA legislation. Instead, that clause was enacted as part of the Federal Aviation Act of 1958. 49 U.S.C. § 40101, et seq. and 49 U.S.C. § 40120(c). The ADA was enacted 20 years later and did not contain any savings clause. Moreover, as the Kiefer court noted, even if that general "remedies" savings clause was applicable to the scope of ADA preemption, Morales held that it could not be interpreted to limit the intended scope of same. In this regard, Kiefer cited to the following holding in Morales:

The [Supreme] Court rejected the argument that the savings clause in the prior statute limited the breadth of the preemption provision. "A general remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provision . . ." Id. at 385. Underscoring the point, the [Supreme] Court added: "We do not believe Congress intended to undermine this carefully drawn statute through a general savings clause." Id. (quoting International Paper Co. v. Ouellette, 479 U.S. 481, 494, 93 L. Ed.2d 883, 107 S. Ct. 805 (1987).

The [Supreme] Court also rejected the arguments that the ADA "only preempts the States from actually prescribing rates, routes or services", id., and that "only state laws specifically addressed to the airline industry are pre-empted", 504 U.S. at 386. Such "loopholes" would allow

> "state impairment of the federal scheme" and ignore the broad "relating to" language of the provision. Id. The [Supreme] Court cited Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 95 L. Ed.2d 39, 107 S. Ct. 1549 (1987) which held that the preemption provision in ERISA, similar to the ADA's, extended to common-law tort and contract actions, 481 U.S. at 47-48.

920 S.W.2d at 279.

As noted by the Texas Supreme Court in Kiefer, Morales recognized that the preemptive scope of the ADA was not limited to laws specifically addressed to the airline industry. Id. Moreover, as Kiefer noted, this Court's direct analogy to the ERISA preemption provision in Morales and its citation to its prior decision in Pilot Life clearly establishes that the form of a party's cause of action, i.e., a common law contract or tort claim, cannot be cited as a basis for holding that a claim otherwise preempted should be allowed to proceed irrespective of the regulatory effect of

such a cause of action. Id. Such a conclusion is not warranted by any of the cited case law and certainly not warranted by any fair reading of this Court's subsequent decision in Wolens.

The Superior Court of New Jersey, Appellate Division, properly applied the preemption rule set forth by this Court in Wolens when it held that the Petitioner's claim was preempted by the ADA. The New Jersey Appellate Court correctly noted that the preemption rule set forth in Wolens "confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement. (Pet. App. A at 5a, citing Wolens 513 U.S. at 232-33) (emphasis supplied). That distinction is at the heart of the issue herein.

The Petitioner asserts that in Wolens, this Court held that the ADA does not preempt any common law contract claims. (Pet. 7). Such an argument is without merit. The holding in Wolens is not so broad. The real question, which the Petitioner does not even address, is whether Wolens preempts the particular contract claim

asserted herein. It surely is preempted, for precisely the reasons noted by the New Jersey Appellate Court.

As the New Jersey Appellate Court noted, Wolens draws an important distinction between the types of common law contract claims which are preempted and those which are not preempted. Petitioner ignores this crucial distinction because the common law contract claim at issue herein clearly falls within the type of claim which is preempted.

In Wolens, the plaintiff passengers brought suit challenging the defendant/airline's retroactive modification of its frequent-flyer program. 513 U.S. at 224-225. The plaintiffs alleged that the airline's retroactive modifications to their original contract devalued credits the plaintiffs had already earned and constituted a breach of their original contract. Id. The plaintiffs' suit in Wolens challenged the defendant/airlines's right to retroactively modify their original bargain. Id.

In Wolens, this Court held that the ADA preempted the plaintiffs' attempt to use the Illinois Consumer Fraud Act to enlarge or police the contract which they originally

entered into. 513 U.S.at 228. It stated that "Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive State laws." Id. However, this Court also held that the ADA preemption provision does not shelter airlines from claims alleging no violation of state imposed obligations, but "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." Id.

In analyzing whether a particular contract claim seeks recovery solely for the airline's alleged breach of its own, self-imposed undertakings, this Court held in Wolens that the ADA's preemption clause, read together with the FAA's savings clause, "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." 513 U.S. at 232-233.

This Court found the foregoing distinction crucial in determining whether a contract claim is preempted. Accordingly, it held in Wolens that "[t]his distinction between what the State dictates and what the airline itself

undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 513 U.S. at 233.

The foregoing distinction illuminates why one of the breach of contract claims in Wolens was not preempted and why the claim in the case at bar is preempted. Contrary to the non-preempted contract claim in Wolens, the contract at issue in the case at bar is clear in regard to the fee charged for a lost ticket. Indeed, even the Petitioner does not claim that the disputed term is ambiguous or susceptible to different interpretations. Thus, there is no issue as to whether Respondent "dishonored a term the airline itself stipulated to". Rather, the Petitioner's claim is an improper attempt to invalidate the parties' bargain by "enlarging or enhancing" the bargain though the use of "state laws or policies external to the agreement." As the New Jersey Courts recognized, such a contract claim is clearly preempted pursuant to Wolens.

CONCLUSION

There is no basis in law or fact to disturb the holding of the New Jersey State courts which have recognized that New Jersey law cannot be used to void one of the terms of an airline's contract of carriage and then penalize the airline for acting in accordance with same. Petitioner's lack of substantive authority to support a contrary result is not surprising since both Morales and Wolens clearly reject such a claim. Accordingly, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

Jeffrey J. Ellis
Brian P. Sexton
Donna H. Bakalor
Richard M. Freiman*
QUIRK AND BAKALOR, P.C.
845 Third Avenue
New York, New York 10022

* Counsel of Record

APPENDIX

Class Action
Complaint, filed
November 14, 1996

GOLDSTEIN TILL & LITE
Two Gateway Center, 12th Floor
Newark, New Jersey 07102
(201) 623-3000

KAUFMAN MALCHMAN KIRBY & SQUIRE, LLP
919 Third Avenue
New York, New York 10022
(212) 371-6600

Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-C-12831-96

CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

LESLEY GAY BLACKNER, on behalf of herself and all others similarly situated

Plaintiff,

-against-

CONTINENTAL AIRLINES, INC.,

Defendant.

Plaintiff Lesley Gay Blackner, who resides at 52 East End Avenue, New York, New York 10028, by her attorneys, alleges as follows upon information and belief, except for the allegations pertaining to herself which are based upon personal knowledge:

NATURE OF THE ACTION

1. The litigation arises out of the practice of defendant Continental Airlines, Inc. ("Continental") of imposing illegal penalties to replace lost or forgotten airline tickets.

2. Continental incurs de minimis costs to issue replacement airline tickets. Yet, Continental imposes fees of up to 100 times its actual costs or more as a penalty to try to discourage passengers from losing or forgetting tickets. Such penalties, which are far in excess of any reasonable costs incurred when a customer misplaces a ticket, are not permitted under New Jersey or under the laws of any other state.

PARTIES

3. Plaintiff Lesley Gay Blackner is a Continental passenger who lost her Continental airline ticket and was assessed a $60.00 penalty fee for the issuance of a replacement ticket.

4. Defendant Continental is a Texas corporation headquartered at 2929 Allen Parkway, Houston, Texas 77019. Continental does business throughout the world, and maintains very substantial operations at Newark International Airport in Newark, New Jersey, one of Continental's hub locations.

SUBSTANTIVE ALLEGATIONS

5. On March 18, 1996,-plaintiff purchased a round trip air transportation ticket for $210.00 from Continental to travel on Continental flights between Jacksonville, Florida and Newark International Airport in Newark, New Jersey. Plaintiff flew on a Continental flight from Jacksonville to Newark on march 28, 1996.

6. Prior to her return flight from Newark, plaintiff discovered that she had lost her ticket.

7. When plaintiff arrived at the Continental terminal at Newark International Airport on April 7, 1996 for her return flight that day to Jacksonville, Florida, plaintiff explained to a Continental agent that she had lost her return airline ticket. The Continental agent responded that plaintiff would have to purchase a replacement ticket. The Continental agent further told plaintiff that she could apply for a lost ticket refund and that a $60.00 charge would

be deducted from her refund.

8. Confronted with the prospect of either paying the $60.00 lost ticket fee or not flying back to Jacksonville at all, plaintiff had no choice, and she was forced to purchase a replacement ticket from Continental for $105.00, which she paid for with a credit card. The Continental agent provided plaintiff with a lost ticket refund application.

9. Plaintiff completed and later submitted Continental's lost ticket refund application to Continental when she arrived at the Jacksonville, Florida airport. By letter dated August 23, 1996, Continental informed plaintiff that $45.00 would be credited to her credit card account within 30 to 45 days. The $105.00 amount plaintiff was compelled to pay for the replacement ticket, less the $45.00 refund, equals the $60.00 penalty imposed on plaintiff by Continental -- a penalty amounting to over 57% of the replacement ticket's price.

10. As reported in a May 5, 1996 article entitled "It's Your Money / Air-Ticket Loss Can Be Costly," published in the newspaper Newsday, Continental generally requires a person who reports a lost ticket for a domestic flight to pay the full fare for a replacement, without any

discounts that may apply to advance orders. If Continental determines that the original ticket has been used, the consumer gets no refund. If the original ticket is not used, the refund is issued for the purchase of the replacement ticket minus a $60.00 charge.

11. The cost of electronically issuing a replacement airline ticket is about 50 cents as reported by the Associated Press in a March 19, 1996 article headlined "Airline Group Urges Government To Be Flexible About Ticketless Travel." Such an electronic, computer-generated ticket would have sufficed to permit plaintiff to board her plane. Indeed, Continental now offers such electronic tickets to passengers on all of its domestic flights. Even if it were necessary to generate an actual paper replacement ticket, such a ticket does not cost more than $8.00 a piece to issue, as reported by the Associated Press in the March 19, 1996 article. Thus, the $60.00 charge for replacing a lost ticket is clearly a penalty imposed by Continental, unrelated to any reasonable cost it may actually incur by issuing a replacement ticket.

12. Bill Dreslin, a spokesperson for American Airlines, which also charges a $60.00 fee for replacing a lost airline ticket, actually admitted in the May 5, 1996 article

"It's Your Money / Air-Ticket Loss Can Be Costly" in Newsday that the $60.00 fee is "a penalty to try to discourage folks from losing tickets." Upon information and belief, Continental imposes the $60.00 fee for this reason, as well as to generate additional profits.

13. Plaintiff brings this action on her own behalf and as a class action pursuant to Rule 4:32 of the New Jersey Court Rules on behalf of all persons who were assessed an improper penalty fee of $60.00 by Continental for replacement of lost airline tickets (the "Class").

14. This action is properly maintainable as a class action for the following reasons:

(a) The class for whose benefit this action is brought is so numerous that joinder of all class members is impracticable. Thousands of airline tickets are reported lost each year. The members of the Class are geographically dispersed throughout New Jersey and the United States.

(b) There are questions of law and fact which are common to all members of the Class and which predominate over any questions affecting only individual members. The common questions include, inter alia, the following:

(i) whether the parties to the contract embodied by the Continental airline ticket, i.e. plaintiff and

the Class on the one hand and Continental on the other, intended to provide for an assessment of costs or damages rather than the imposition of a penalty;

(ii) whether the imposition of a $60.00 fee for replacing a lost ticket, far in excess of any reasonable cost actually incurred or damages suffered by Continental resulting therefrom, constitutes an unenforceable penalty pursuant to the contract law of New Jersey and the other states;

(iii) whether the costs or damages for which the penalty fee is meant to compensate Continental are difficult or impossible to calculate at the time the original ticket is purchased:

(iv) whether the penalty fee imposed by Continental for replacing a lost ticket is reasonably related to the cost actually incurred, or damages, if any, suffered by Continental in issuing a replacement ticket;

(v) whether the parties are of equal bargaining power; and

(vi) whether plaintiff and the members of the Class have suffered damages as a result of Continental's wrongful acts and the measure of such damages.

(c) Plaintiff's claims are typical of the claims

of the other members of the Class and plaintiff has no interests that are adverse or antagonistic to the interests of the Class.

(d) Plaintiff is committed to the vigorous prosection of this action and has retained competent counsel experienced in class action and consumer litigation of this nature. Plaintiff is an adequate representative of the Class and will fairly and appropriately protect the interests of the Class.

(e) The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the defendant.

FIRST CAUSE OF ACTION

(Breach Of Contract - Penalty)

15. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

16. Under the contract law of New Jersey and the other states, the imposition of a penalty in commercial transactions is prohibited.

17. The $60.00 fee imposed by Continental on passengers who lose their Continental airline tickets is a penalty because:

(a) the costs or damages for which the fee is meant to compensate Continental are not difficult or impossible to calculate at the time the original ticket is purchased. The cost of issuing an electronic replacement ticket is approximately 50 cents and the cost of issuing a paper replacement ticket is approximately $8.00;

(b) the $60.00 fee imposed by Continental for replacing a lost ticket is not reasonably related to the cost or damages actually incurred by defendant, i.e. 50 cents for issuing an electronic replacement ticket, or at most, $8.00 for issuing a paper replacement ticket; and

(c) the parties to the contract embodied by the original plane ticket, i.e. plaintiff and the class members on the one hand and Continental on the other, are not of equal bargaining power. Continental is a world-wide corporation with vast legal and financial resources, and the terms of the contract are drafted entirely by Continental.

18. Defendant's practices in imposing an improper penalty constitute a breach of contract and have injured plaintiff and the members of the Class. Accordingly,

plaintiff seeks damages, on behalf of herself and all others similarly situated, for reimbursement of the penalty fees wrongfully imposed by Continental due to the loss of airline tickets, plus interest, costs, and attorneys' fees.

SECOND CAUSE OF ACTION

(Unjust Enrichment)

19. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

20. As a proximate consequences of Continental charging improper $60.00 penalties for replacing lost airline tickets, Continental has been unjustly enriched in the amount of each such $60.00 sum charged to plaintiff and the members of the Class, less the amount of any actual costs reasonably incurred by defendant for replacing the lost tickets of plaintiff and the members of the Class.

THIRD CAUSE OF ACTION

(Breach Of Contract For Breach Of The Duty Of Good Faith And Fair Dealing)

21. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

22. Continental has an obligation to act towards plaintiff and the members of the Class in accordance with the

implied covenant and business relationships.

23. Continental has breached its duty of good faith and fair dealing to plaintiff and the members of the Class by imposing an illegal penalty for misplacing one's airplane ticket, thereby causing economic injury to plaintiff and the members of the Class. Such breaches are believed to be ongoing.

WHEREFORE, plaintiff demands judgment both individually and in favor of the Class and against defendant as follows:

A. Declaring this action to be properly maintainable as a class action pursuant to Rule 4:32 of the New Jersey Court Rules and certifying plaintiff as an appropriate class

B. Declaring that the $60.00 fee as alleged herein is an improper and unlawful penalty and that the imposition

of such fee constitutes a breach of the airline ticket contracts entered into by plaintiff and the members of the Class with Continental;

C. Awarding reimbursement of each $60.00 fee charged to each class member for replacing lost tickets, less any actual costs reasonably incurred or damages reasonably suffered by Continental as found at trial;

D. Enjoining Continental from assessing excessive and unreasonable lost ticket penalties grossly in excess of the reasonable actual costs to Continental of reissuing lost tickets;

E. Awarding to plaintiff and the members of the Class interest, costs, and reasonable attorneys' and expert fees; and

F. Awarding such other and further relief as may be just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: Newark, New Jersey
November 14, 1996

GOLDSTEIN TILL & LITE

By:_____
Allyn Z. Lite, Esq.
Robert J. Berg, Esq.
Two Gateway Center
12th floor
Newark, New Jersey 07102
(201) 623-3000

Attorneys for Plaintiff

OF COUNSEL:
KAUFMAN MALCHMAN KIRBY
& SQUIRE, LLP
919 Third Avenue
New York, New York 10022
(212) 371-6600

Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98-924

In The

Supreme Court of the United States

October Term, 1998

LESLEY GAY BLACKNER

Petitioner,

v.

CONTINENTAL AIRLINES,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROGER W. KIRBY*
DANIEL HUME
KIRBY McINERNEY
& SQUIRE, LLP
830 Third Avenue
New York, NY 10022
(212) 317-2300
Attorneys for Petitioner

*Counsel of Record

3PP

Respondent rests its opposition to the petition on the view that under both *Wolens*[1] and *Morales*[2] common law disputes of the sort at issue here are preempted by the ADA.[3] Respondent also argues that *Kiefer*[4] supports its interpretation of *Wolens* and *Morales*. Respondent is wrong.

Morales involved claims based only on state consumer protection statutes, and specifically declined to address whether the ADA preempts other types of claims. 504 U.S. at 390.

In *Wolens*, this Court held that the ADA does not preempt common law contract claims. As *Kiefer* described it, "the issue...was whether the private [contract] actions constituted state enactment or enforcement of any law prohibited by the preemption provision." *Kiefer* at 279 (citations omitted). *Wolens* resolved the issue respecting contract disputes as follows: "A common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement...imposed under State law.'" *Wolens*. at 229 (citation omitted). *Wolens* itself seemed to recognize that while suits respecting private contracts necessarily implicate enforcement of state law, *viz*, that of contracts (*see Kiefer* at 280, 282), such implication without more does not transform contract issues into preempted matter.

---

1 *American Airlines v. Wolens*, 513 U.S. 219 (1995).

2 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

3 Airline Deregulation Act, 49 U.S.C. § 41713(b)(1).

4 *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274 (Tex. 1996).

To sum it up, for purposes of determining whether the matter at bar is a foil for a state statute designed to intrude upon the scope of ADA preemption, there is no substantive difference between Wolens' entitled efforts to enforce a contract provision and petitioner's attempt to void one.[5]

---

[5] Respondent's position would lead to absurd results. For example, under respondent's view of *Wolens*, a New Jersey court could hear a plaintiff's breach of contract claim, but not a statute of frauds affirmative defense to that claim.

CONCLUSION

For the reasons set forth herein and in petitioner's prior papers, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Roger W. Kirby*
Daniel Hume
KIRBY McINERNEY
& SQUIRE, LLP
830 Third Avenue
New York, NY 10022
(212) 317-2300
Counsel for Petitioner

*Counsel of record